IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1293

CLYDE R. GOAD, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

1. In Point 1 of the "Memorandum for the United States in Opposition" (p. 4), the Solicitor General argues that the Eighth Circuit opinion below did not eliminate intent as an element of a 501(c) violation, and that the holding (to which he points with approval) was simply that "good faith would not have been shown by petitioners' belief that their unauthorized expenditures would benefit the union." This passage alone demon-

strates the wide disparity between the Eighth Circuit-Solicitor General viewpoint and the long existing common law, hence the need for Supreme Court review. In the first place, it is not for the Court or the government to speculate as to the ultimate effect of "petitioners' belief"; rather, it is the sole function of the jury to make this determination. Moreover, the above-quoted passage directly contradicts the plain holding of Judge Moore in *United States v. Silverman*, 430 F. 2d 106, 115:

> "The existence of a bona fide union benefit would be strong evidence that there was no intent to deprive the union of the use of its funds."

It is indeed paradoxical for the Eighth Circuit (and the Solicitor) to deny that they have eliminated intent as an element of the offense on the one hand, yet categorically refuse to permit evidence to refute intent on the other.

2. In Point 2 of his argument (p. 5), the Solicitor urges that the excluded evidence (as to reasonableness and justification for petitioners' pay raises) would not have negated the "fraudulent intent in circumventing the precise, constitutionally mandated procedures to obtain such increases." By this neat bootstrap argument, the Solicitor assumes that the act of circumventing the constitutionally mandated procedures is *ipso facto* proof of fraudulent intent. Such is not the case; fraudulent intent in this type of crime is a separate element which must be separately proved to the satisfaction of the jury, *Morisette v. United States*, 342 U. S. 246, 276, and is not synonymous with violating the union's constitution. The Solicitor's argument, of course, is that some sort of presumption of fraudulent intent arises from the mere fact that petitioners intentionally "circumvented" the union's constitutional procedures,[1] and that this

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[1] Petitioners, by this argument, certainly do not concede that there were "precise, conditionally mandated procedures" for this union. Rather, petitioners contend, the procedures authorized by the union's constitution, by-laws, and resolutions were duplicitous, overlapping, and ambiguous, at best.

presumption cannot be offset or rebutted by evidence that petitioners otherwise acted in good faith. But this argument, too, was rejected in *Morisette*, where this Court held that "presumptive intent" has no place in this type of case, 246 U.S. at p. 275. The intent must be determined, says *Morisette*, "not only from the act of taking, but from that together with defendant's testimony *and all of the surrounding circumstances*." (Emphasis added, 246 U.S. at p. 276.) The Eighth Circuit and Solicitor General, however, would bar the proof of these surrounding circumstances.

3. The Solicitor's assertion, in Point 3 of his brief, that all members of the panel in *United States v. Silverman*, supra, "assumed" that a 501(c) conviction may be based *either* on a lack of authorization *or* an absence of union benefit, is misleading. The majority of that panel (Judges Friendly and Hayes) simply stated that "even if one should accept *arguendo*" that a 501(c) conviction can be supported by either a lack of authorization or an absence of union benefit, the record was fatally deficient, 430 F. 2d at p. 127. It is patently clear from this opinion, and the language of Judge Friendly (concurred in by Judge Hayes), that they did not agree with Judge Moore's minority opinion that either element (lack of authorization *or* absence of union benefit) would sustain a conviction.

The Solicitor also argues that, since petitioners accepted the offices to which they were elected at specified salaries, no union benefit could have been derived from paying additional monies to them. This argument overlooks the uncontradicted evidence that after petitioners took office, their hours of work and extent of duties vastly increased; certainly they were not under any binding contract to continue to work for their original salaries, and were free to resign (or reduce the scope of their activities, to the detriment of the union) if they did not receive increases. Thus, the record clearly contains evidence which would permit the jury to find (if it so chose) that the union did benefit, or

receive a *quid pro quo*, from these salary increases. The prejudice to petitioners is that the Solicitor has again substituted his view of the evidence for a jury's.

Respectfully submitted

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